

ORDER

AND NOW, this 10th day of May, 1989, for the reasons set forth in this Court's Memorandum of May 10, 1989,

IT IS ORDERED that plaintiff United States' Motion for Leave to File a Second Amended Complaint is GRANTED and defendant T & N shall, within ten days of service of the Second Amended Complaint, file an Answer; and

IT IS FURTHER ORDERED that defendant T & N's Motion to Dismiss the First Amended Complaint, treated by this Court, pursuant to Fed.R.Civ.P. 12(b), as a Motion for Summary Judgment, is DENIED; and

IT IS FURTHER ORDERED that defendant T & N's Motion for Certification for Immediate Appeal pursuant to 28 U.S.C. § 1292(b) is DENIED.



UNITED STATES of America

v.

NICOLET, INC., et al.

Civ. A. No. 85-3060.

United States District Court,
E.D. Pennsylvania.

May 25, 1989.

Government moved for partial summary judgment in suit against corporation for costs incurred by Environmental Protection Agency in responding to release or threatened release of hazardous substance at waste disposal site. The District Court, Raymond J. Broderick, J., held that asbestos was "hazardous substance" under Comprehensive Environmental Response, Compensation, and Liability Act.

Motion granted.

al aspects of the site. In the instant case, [the bank] merely foreclosed on the property after all operations had ceased and thereafter took prudent and routine steps to secure the property against further depreciation. (emphasis added).

Id. at 12. Much the same conclusion was reached by the district court in *United States v. Fleet Factors Corp.*:

I interpret the phrases "participating in the management of a ... facility" and "primarily to protect his security interest," to permit secured creditors to provide financial assistance and general, and even isolated instances of specific, management advice to its debtors without risking CERCLA liability if the secured creditor does not participate in the day-to-day management of the business or facility either before or after the business ceases operation.

slip op. at 10. Thus, existing case law suggests that a mortgagee can be held liable under CERCLA only if the mortgagee participated in the managerial and operational aspects of the facility in question.

V. Defendant T & N's Request for Certification for Interlocutory Appeal

[11] Defendant T & N requested, in the event that this Court denied its motion (which this Court has converted to a motion for summary judgment), that the issues concerning the legal reach of CERCLA liability be certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). This Court has determined that the issues involved in the motion are not controlling questions of law offering substantial ground for difference of opinion as to the correctness of this Court's opinion and order such that an immediate appeal of that opinion and order would materially advance the ultimate termination of the litigation. *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir.) (in banc), *cert. denied*, 419 U.S. 885, 95 S.Ct. 152, 42 L.Ed.2d 125 (1974). Indeed, as previously stated, there exist genuine issues of material fact which can only be resolved at trial. Therefore, T & N's motion for certification for immediate appeal pursuant to 28 U.S.C. § 1292(b) will be denied.

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Superfund

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Site:	<u>Certainated</u>
ID #:	<u>410980631163</u>
Break:	<u>17.8</u>
Other:	<u>5-25-89</u>

Health and Environment §25.5(5.5)

Asbestos is "hazardous substance" under Comprehensive Environmental Response, Compensation, and Liability Act. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101(14), 42 U.S.C.A. § 9601(14).

See publication Words and Phrases for other judicial constructions and definitions.

David Street, Dept. of Justice, Washington, D.C., Susan Dein Bricklin, Virginia Gibson-Mason, Asst. U.S. Attys., Philadelphia, Pa., for U.S.

Jon Brooks, New York City, for T & N.

Joel Schneider, Philadelphia, Pa., for Nicolet.

MEMORANDUM

RAYMOND J. BRODERICK, District Judge.

The United States, at the request of the Administrator of the Environmental Protection Agency ("EPA"), brings this action against defendant T & N plc ("T & N"), alleging that T & N was liable, pursuant to § 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607, for costs incurred by the EPA in responding to a release or threatened release of a hazardous substance at a waste disposal site in Ambler, Pennsylvania ("Ambler site"). A nonjury trial is presently scheduled to commence on June 5, 1989.

On April 20, 1989, the United States filed a motion for partial summary judgment in its favor on the issue that, under CERCLA, 42 U.S.C. § 9601(14), asbestos is a hazardous substance. For the reasons stated below, this Court will grant the United States' motion.

Summary judgment must be entered when the moving party demonstrates to the court that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In determining whether the movant has met his burden, the Court must inquire "whether the evidence presents a significant dis-

agreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). An issue is "genuine" only if the evidence is such that a reasonable jury could find for the party opposing the motion. *Equi-mark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp.*, 812 F.2d 141, 144 (3d Cir. 1987). If the moving party meets this burden, the opposing party must come forward "with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). In reaching its ruling on a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party, *Lyons v. U.S. Marshalls*, 840 F.2d 202, 204 (3d Cir.1988), and draw all inferences and resolve all conflicts in favor of the non-movant. *Gans v. Mundy*, 762 F.2d 338, 340 (3d Cir.), *cert. denied*, 474 U.S. 1010, 106 S.Ct. 537, 88 L.Ed.2d 467 (1986).

"The mere fact that issue may be complex is not a valid reason to deny summary judgment when there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law." *Zweig v. Hearst Corp.*, 521 F.2d 1129, 1136 (9th Cir.), *cert. denied*, 423 U.S. 1025, 96 S.Ct. 469, 46 L.Ed.2d 399 (1975). Thus, courts have not hesitated to grant partial summary judgment in CERCLA cases. See, e.g., *United States v. Wade*, 577 F.Supp. 1326, 1330 (E.D.Pa.1983); *United States v. Conservation Chemical Co.*, 619 F.Supp. 162, 175 (D.Mo.1985); *United States v. South Carolina Recycling and Disposal, Inc.*, 20 Env't Rep.Cas. (BNA) 1753, 1755 (D.S.C.1984). Such rulings are, of course, favored inasmuch as the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S.

317, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986).

Section 107(a) of CERCLA identifies those "persons" who are liable for response costs incurred by the United States under Section 104 of CERCLA, 42 U.S.C. § 9604. Certain of the requisite elements of a prima facie case under § 107(a) concern the waste disposal site in general, while others concern the individual defendants. With respect to the Ambler site, the United States must establish the following:

- (1) the Ambler site is a "facility";
- (2) a "release" or a "threatened release" of a or any "hazardous substance" from the Ambler site has occurred; and
- (3) the release or threatened release has caused the United States to incur "response costs."

United States v. Conservation Chemical Co., 619 F.Supp. at 184; *see also New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir.1985). As previously stated, in its instant motion, the United States seeks partial summary judgment on the issue that asbestos constitutes a "hazardous substance" for purposes of liability under § 107(a).

CERCLA defines hazardous substance at section 101(14) as follows:

The term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulations of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollution listed under section 112 of the Clean Air Act, (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, includ-

ing crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

42 U.S.C. § 9601(14). It is well established that a substance is a hazardous substance if it falls within *any one* of the subparagraphs of § 9601(14). *Eagle-Pitcher Industries v. United States E.P.A.*, 759 F.2d 922, 927 (D.C.Cir.1985); *United States v. Wade*, 577 F.Supp. at 1339-1341; *United States v. Union Gas Co.*, 586 F.Supp. 1522, 1523 (E.D.Pa.1984); *State of Idaho v. Bunker Hill Co.*, 635 F.Supp. 665, 673 (D.Idaho 1986); *United States v. Conservation Chemical Co.*, 619 F.Supp. at 185; *United States v. Metate Asbestos Corp.*, 584 F.Supp. 1143, 1146 (D.Ariz.1984).

Asbestos, the substance in issue in this litigation, meets the definition of hazardous substance of §§ 9601(14)(B), (D), and (E).

First, asbestos has been listed as a hazardous substance under § 9602 of CERCLA, see 40 C.F.R. § 302.4 and Table 302.4, and therefore, meets the definition of hazardous substance at § 9601(14)(B). Second, asbestos is a toxic pollutant listed under § 1317(a) of title 33, the Water Pollution Control Act, see 40 C.F.R. § 401.15, and therefore, meets the definition of a hazardous substance at § 9601(14)(D). Third, asbestos is a hazardous air pollutant listed under § 7412 of title 42, the Clean Air Act, see 40 C.F.R. 61.01, and therefore, meets the definition of hazardous substance at § 9601(14)(E). We note that as long as a substance is on one or more of the lists identified at 42 U.S.C. § 9601(14), it is a hazardous substance irrespective of the volume or concentration of the substance found at the site in question. *United States v. Wade*, 577 F.Supp. at 1340; *United States v. Conservation Chemical Co.*, 619 F.Supp. at 238; *United States v. Carolawn Products*, 21 E.R.C. 2124, 2127 (D.S.C.1984).

Accordingly, for the reasons stated, this Court will grant the United States' motion for partial summary judgment on the issue that, under CERCLA, asbestos is a hazardous substance.



PRESTON TRUCKING COMPANY, INC.,
a corporation; and **Protective Insurance Company, Inc.,** a corporation,
Plaintiffs,

v.

CAROLINA CASUALTY INSURANCE COMPANY, Defendant.

Civ. A. No. 83-1691.

United States District Court,
W.D. Pennsylvania.

Jan. 26, 1989.

Trucking company, which was lessee of tractor trailer rig, and trucking company's insurer sought declaration that owner of tractor trailer rig and owner's insurer were primarily liable for claims arising out of accident caused solely by owner's negligence which occurred after owner leased rig and agreed to drive rig as employee of lessee. The District Court, Diamond, J., held that "truckmen's endorsement" in owner's automobile liability policy resulted in that policy providing at most only excess coverage for claims arising out of accident.

Ordered accordingly.

Insurance \S 512.1(4)

"Truckmen's endorsement" in automobile liability policy under which owner of tractor trailer rig was named insured resulted in policy providing at most only excess coverage for claim arising out of accident caused by sole negligence of owner which occurred after owner leased rig to trucking company and agreed to drive rig

as employee of lessee, and therefore insurer for trucking company was primarily liable for claims arising out of accident, and neither lessee of rig nor lessee's insurer could seek indemnity from owner's insurer since lease agreement between parties provided for right of indemnity only where owner's conduct arose to level of gross negligence or criminal conduct.

Richard J. Mills, Meyer, Darragh, Buckler, Bebenek & Eck, Pittsburgh, Pa., for plaintiffs.

Robert B. Truel, Truel & Ploeger, Pittsburgh, Pa., for defendant.

OPINION

DIAMOND, District Judge.

Plaintiffs, Preston Trucking Company, Inc. ("Preston") and Protective Insurance Company, Inc. ("Protective"), brought this action for declaratory judgment against the defendant Carolina Casualty Insurance Company ("Carolina") seeking a judgment declaring:

(a) that a policy of insurance issued by Carolina to one Franklin E. Safrit ("Safrit") afforded primary insurance coverage for a certain accident which occurred in Tioga County, Pennsylvania, on December 16, 1981; and,

(b) that a so-called indemnity contract between Protective and Preston either was not applicable or was excess insurance coverage for that accident; and,

(c) that Carolina be directed to reimburse Preston and Protective for all sums paid by or on behalf of Preston in satisfaction of all claims arising out of that accident and for all costs and legal fees incurred in the investigation, negotiation and settlement of said claims.

Findings of Fact

The parties have submitted the case to the court on the following agreed finding of fact, which the court adopts:

1. On or about December 16, 1981, Franklin E. Safrit ("Safrit"), Box 131, Hurlock, Maryland, was the owner of a certain